UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEXT COMMUNICATIONS, INC., et al.,

Plaintiffs,

v. 14 CV 8190 (RJS)

VIBER MEDIA, INC.,

Defendant.

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New York, N.Y.
February 13, 2015
9:42 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

WNF LAW, P.L.
Attorneys for Plaintiffs
BY: DANIEL FOODMAN (By Telephone)
NEIL L. POSTRYGACZ

MEISTER SEELIG & FEIN LLP
Attorneys for Defendant
BY: JEFFREY P. WEINGART
SUSAN M. SCHLESINGER

(In the robing room)

THE COURT: This is Next Communications v. Viber Media. Let me just take appearances, and speak up nice and loud so Mr. Foodman can hear everybody. For the plaintiff?

MR. FOODMAN: (By Telephone) This is Daniel Foodman on behalf of plaintiff Next Communications and NxtGn, Inc.

THE COURT: All right. Good morning, Mr. Foodman. And your local counsel was just announcing his name as you were speaking, so let's do that again.

MR. POSTRYGACZ: Neil Postrygacz also on behalf of plaintiff.

MR. WEINGART: For defendant, Jeff Weingart.

THE COURT: Mr. Weingart.

MR. WEINGART: And my colleague, Susan Schlesinger.

THE COURT: Good morning to you.

This is our first conference. I've reviewed the complaint, as well as the premotion letters relating to defendant's contemplated motion to dismiss. I've also reviewed the joint letter of the parties and the proposed case management plan.

And I guess my first question out of the gate is why the heck are you guys here? It seems to me that nothing in the complaint has anything to do with New York, right? I know there's an agreement that the parties specified New York choice of law and New York choice of venue, but I scoured the

complaint to see what the heck any of this has to do with New York. There's a Florida corporation, a Panama corporation. The contract doesn't seem to have been negotiated here. None of the events seem to have been here. You just sort of like New York, you can make it here, you'll make it anywhere, is that the thinking?

MR. FOODMAN: Your Honor, we believe that we needed to bring this in New York because of the provisions in the NDA, your Honor.

THE COURT: Well, all right. But there still has to be I think more than just that to give you jurisdiction. And, certainly, I would have the authority on my own to transfer venue if I nevertheless thought that there was another district that had --

MR. FOODMAN: If defendant would consent to transferring this to Miami, we'd be happy to do that.

THE COURT: Just explain to me the facts. Does either company do business here? Let's start with the Next Communications. Do they do business in New York?

MR. FOODMAN: Your Honor, they do business to the extent people buy minutes from their telecom business. But they're not headquartered in New York. They don't do business in New York. At least to my knowledge, they don't have offices in New York, as well.

THE COURT: And Viber is a Panama company. I'm

reading between the lines, but it seems to me what's going on here is maybe Viber didn't want to get home court in Florida and that's why they wanted to be in New York. But does Viber do business here?

MR. WEINGART: Viber does business in the U.S., but not specifically New York, your Honor. And also just to point out, we're not a Panama corporation. Although the entity that was designated as a defendant is, Viber is now Viber Media SARL, which is a Luxembourg corporation and no longer a Panama corporation.

THE COURT: Viber Media.

MR. WEINGART: Viber Media SARL, which is on the first line of our letter to you.

THE COURT: In any event, Luxembourg.

Mr. Foodman.

MR. FOODMAN: Your Honor, we operated based on the language in paragraph 10 which says any lawsuit or other legal proceeding shall be brought in federal court located in New York County, State of New York -- personal jurisdiction of those state or federal courts.

THE COURT: I get that.

MR. FOODMAN: That was the reason we did it and we fully understand -- your Honor.

THE COURT: My question is why did the parties do that if there's no connection to New York. So if there were a

contract between a New York corporation and a New Jersey corporation, none of which do business other than in those two states, and they decided, you know what, we're going to have our disputes resolved in California, that's enough to give California jurisdiction over the dispute?

MR. WEINGART: Your Honor, we have no objection to having the suit here. We acknowledge that the NDA says what it says about jurisdiction and venue. Viber does business in the U.S. Certainly, it has customers that use --

THE COURT: People use the app.

MR. WEINGART: -- use the app here in New York, certainly, and we have no issue with that. And we think that since the parties did choose this venue, it makes sense to have the action here. There would be no reason whatsoever to change the venue to Miami or wherever Mr. Foodman would like to have it. There's no connection and the parties did not agree that we should be in that court or any other court other than in New York.

THE COURT: I think the issue is am I required to slavishly follow the parties in their agreement to bring an action or bring actions in a state where there don't seem to be any connections, right? You have customers everywhere. I assume if you wanted them to be doing these in the courts of Timbuktu because there must be somebody in Timbuktu who's got the app or apps.

MR. WEINGART: Sure. There are hundreds of millions of people who have the app.

THE COURT: So I guess I think that's not a hundred percent clear to me whether that's enough for jurisdiction. And then in terms of transferring venue, that's certainly I would, even if there is jurisdiction, the Court would have the authority to transfer venue to a district that has more of a connection to the operative facts.

So where were the meetings, where was the agreement negotiated, where did all this stuff take place?

MR. FOODMAN: Your Honor, a number of meetings did take place in Miami. Next does do business in Miami. Its headquarters are in Miami. A lot of the discussions that have to do with the operative facts took place in Miami. So, you know, if the Court were inclined to transfer, we believe that Miami would be where the case should take place. Obviously, opposing counsel is correct that the parties did agree to New York and so we're not going to take a position that's not the case. But certainly from the facts of this case, most of the issues at hand took place in Miami and Next does do business in Miami.

MR. WEINGART: Your Honor, we don't agree with that. There's nothing in the complaint that indicates that these negotiations or the contract was executed there or that there's any particular connection at all with Miami. We don't agree

with that assertion.

THE COURT: I'm not sure I'm bound by what's in the complaint for purposes of a 1404 transfer of venue, but I would need affidavits probably on this.

Where do you think the locus of operative facts is? Where was this negotiated?

MR. WEINGART: Where I think the locus of operative facts is Viber is based and operates out of Israel, and these transactions or this alleged transaction was centered in Israel between Israelis. And there's no reason to think that Miami has anything to do with this transaction.

THE COURT: Miami is where the plaintiffs were, right?

MR. WEINGART: That's where they say they are, but that's not where Viber is and that's not where any of these discussions took place, to my knowledge. The alleged presentations in the complaint talk about presentations that took place in Israel, as far as I know, not Miami.

THE COURT: For the most part, the complaint doesn't really get into geography. So the issues under 1404 would be where the witnesses are, for example, where the locus of operative facts were, where the documents are. That doesn't count for much in the digital age.

Where are the witnesses in this case?

MR. WEINGART: My witnesses are in Israel.

THE COURT: Where are your witnesses, Mr. Foodman?

MR. FOODMAN: Your Honor, a number of our witnesses are in Miami, as well as some of the other witnesses that are mentioned in the complaint also spent time in Miami. For example, Benny Shotto (phonetic) to my knowledge has an apartment that he either rents or owns in Miami Beach. Arik Meimoun, the CEO of Next, resides in Miami. Efrom Ugasharef (phonetic) spends time between Miami and Israel. Moshe Edru (phonetic), who is a witness in this case, he resided in Miami to the best of my knowledge. Next's business is in Miami. The Taranis (phonetic) I believe is in the U.S., but I'd have to confirm that to you.

But the meetings that took place, a number of the meetings that took place took place in Next's offices or in a restaurant in Miami. One of the primary -- in this case took place in a restaurant in Miami. A lot of the discussions took place with people coming from Viber to Miami to meet with Next people.

So, obviously, we believe this case belongs in the United States and certainly, if not Miami, then New York pursuant to the NDA that was signed and agreed to by the parties.

THE COURT: Are there any witnesses in New York?

MR. FOODMAN: Not that I'm aware of, your Honor.

THE COURT: So let's hold that thought. Now let's talk about the contemplated motion by the defendants.

So there's three causes of action -- first, for breach of contract, the second for misappropriation of trade secrets, and the third for misappropriation of a business idea, which I still have trouble getting my head around as a cause of action but it seems to exist.

This is a premotion conference so I'm not ruling on anything. The reason I have premotion conferences is I think that they can be useful to kick it around. It gives me an opportunity to do a little preliminary research, to review the arguments, look at the facts alleged in a complaint, and to at least give you my initial reaction.

I never tell a party they can't make a motion. Even if I think the motion is dead on arrival, I don't tell a party they can't make a motion, but sometimes I say I think it's dead on arrival.

I don't think this one is dead on arrival. It does seem to me, I'll tell you candidly, that the breach of contract claim, there's enough there to survive. Not a slum dunk.

MR. FOODMAN: Your Honor, I can't hear you.

THE COURT: It seems to me the breach of contract claim would survive. I'm not ruling. That's my gut reaction is that it seems that there's enough there to get past the motion to dismiss stage.

The cause of action for misappropriation of a trade secret strikes me as thin, at least as alleged. There's

virtually no specificity as to what the trade secret was. What's alleged, in essence, and I'm just paraphrasing, is that there were discussions between the parties over technologies that are very generally described in the complaint, that the negotiations broke down. There subsequently is a conversation between individuals representing the two parties or employees who are connected to the parties at which there's a discussion that defendants are developing technologies that they didn't have before that sounds similar to the technologies that plaintiffs discussed during the negotiations and which would have been covered by the NDA.

I think without more facts it's not clear to me that's enough to establish a misappropriation of trade secrets. I'm not sure that you couldn't amend and add more skin on those bones and you'd survive. But at least as written, I think that one is a close call. That looks to me, at least today as I stand here, like it might not make it through.

The motion to dismiss the third cause of action, the third cause of action for misappropriation of a business idea, I guess really turns on whether or not the idea that was alleged to have been misappropriated is novel. I think that's a fair characterization as to your most significant argument with respect to that cause of action?

MR. WEINGART: That's a fair characterization of one of the main arguments.

THE COURT: So it does seem to me -- I'm a little fuzzy. Let me ask the plaintiffs, what is the idea that has been misappropriated? Is it just the idea of downloading and streaming concerts, because that doesn't seem to be terribly novel as an idea. It seems to me You Tube has been doing stuff like that.

MR. FOODMAN: Your Honor, it has to do with the celebrity business management, celebrity event management. And, your Honor, we adopted this portion of the complaint, if your Honor recalls, we filed the complaint under seal. So I would just ask that anything we go over today I would at least get the opportunity to make a motion after reviewing the transcript to seal it if there's anything confidential.

We described celebrity event management which would allow celebrities such as musicians to broadcast an event live to millions of simultaneous fans over their mobile devices. Each individual fan could use the app to view the celebrity from a different perspective of their choice and also have the experience of other fans. So that goes along with the underlying technology that's behind it which allows you to zoom in and zoom out to different aspects, for example, on the stage when a performer is singing, whereas a different person who is watching the same exact show could zoom in and zoom out to something completely different and it would not affect any of the other users that are watching this concert. It's all

coming from one camera, your Honor. So it is, it's something that doesn't exist on the market today. There's nothing like that that exists in the market today.

THE COURT: I think that's one that obviously I'd see what you say, what everybody says in the papers. I think they're all fairly close calls. I don't think it's a slam dunk either way on any of them. My gut reaction is that's a close call. I'm not sure which way I would come out on that one.

That's my basic take on this. I'm happy to hear you now. This is not an oral argument. As I said, if you want to go forward with the motion, you can go forward with the motion, but that's my basic takeaway.

Go ahead, Mr. Weingart.

MR. WEINGART: Yes, your Honor. Thank you.

We this week just received a copy of a redacted complaint which purports to contain the trade secrets and the proprietary information that was allegedly conveyed and then misused. I would like to, if I could, I've highlighted in this copy of the complaint those portions which have been redacted from public view.

THE COURT: I don't think we duplicated them on this call. At least thus far, it doesn't seem there's any need to redact out or seal portions of this transcript, but I'll certainly give the parties an opportunity to revisit that later.

But, okay. So what are you asking me to do?

MR. WEINGART: I would just like to point you to, for instance, pages 3 and 4 and 5, which are highlighted, which those portions were redacted. And the other portions of the complaint that were redacted are highlighted. My point being that there's nothing that's highlighted here that constitutes proprietary information or a trade secret or a protectable business idea. These are all very general concepts that have been around for years and years to use software modules and networking modules and hardware across telephony platforms and VoIP.

So, first of all, the complaint was sealed improperly and we move to unseal it. That's the first thing.

The second thing is this complaint, the way it's drafted, reveals that there was nothing proprietary. In fact, there was nothing proprietary that was ever communicated to Viber. This whole lawsuit is about Next approaching Viber and wanting to make a sale to Viber and then sort of being a jilted suitor in the sense that they signed an NDA. The NDA expressly says that there's no obligation to enter into an agreement or conduct a business transaction and Viber chose not to do that. Next kept coming and knocking at the door and trying to make it happen and it didn't happen. And there has been no source code, specifications, methodologies, algorithms, software, nothing was communicated to Viber that in any way constitutes

proprietary information or a trade secret of something that's not already well-known in the marketplace and everything is that is set forth and is highlighted in this complaint.

THE COURT: I think you're basically restating what I viewed as the problem with the second cause of action. The third cause of action I think also seems pretty thin, but I think it turns on whether or not what is alleged in the complaint is a novel idea. But I think I'm agreeing with you in what you just said about the second cause of action.

MR. WEINGART: And it would be the third cause of action, as well, because there's nothing that's novel at all about streaming. In paragraph 18 it talks about streaming video from a concert so people can see it. It's realtime, over high definition, different views. All those things have been happening for years and years. There's nothing novel about that concept. That cause of action also is -- they don't state a cause of action.

First of all, even if there is a cause of action for misappropriation of business idea, as you say, we don't really think even to the extent there is one that it would apply in this situation, nor have they in the complaint satisfied whatever requirements might exist for that.

THE COURT: The problem I have with the business idea one, this is a motion to dismiss or contemplated motion to dismiss, so I'm not sure I should be going too far outside of

the record to be seeing whether or not there is this kind of technology and there is streaming video with different vantage points. It starts to sound like summary judgment. On the other hand, I have to be able to decide as a matter of law whether what is alleged is in fact novel, which is one of the elements of the third cause of action.

So I guess I don't want to cut you short, but it does seem to me that this is one that we're probably going to need to brief a little more.

MR. WEINGART: I agree with you, your Honor. Paragraph 18, even if you were looking at that in the issue of whether it was going to be a motion to dismiss or motion for summary judgment or treat it like a motion for summary judgment, there's nothing in paragraph 18 that sort of sets up why this was so novel and revolutionary and even pleads that that's the case. So to me, that should be ripe for motion to dismiss. But I know I'm repeating some of what you were saying before.

THE COURT: I think we live in a strange world under Iqbal and Twombly. For a cause of action based on misappropriation of a business idea, are you required to plead the fact which is really just a conclusion that this is a novel idea? I just think it all runs into just strange philosophy of pleading standards which comes up from time to time in certain cases.

So, look, I think certainly it sounds like you intend to make a motion, but maybe we should first ask plaintiffs whether they intend to amend the complaint. So, Mr. Postrygacz or Mr. Foodman, what do you think?

MR. FOODMAN: Your Honor, not at this point because, as your Honor says, you haven't really had an opportunity for us to brief everything. The definition of novelty, the fact that we have something that does not exist in the market today, that's something that is pretty unique. That in and of itself would lead us to believe it's novel. If the Court ultimately finds that the facts we pled aren't sufficient, that would be something we need to determine at summary judgment, not motion to dismiss stage, obviously, we would like the opportunity to amend at that point.

THE COURT: Not a chance. That's the reason why I have premotion conferences. So you will invite me to have a premotion conference, take premotion letters, then have briefing, then I'll rule, and if I go along the line of what I think I'm likely to rule, then you'd like the opportunity to amend?

Now is your opportunity to amend. Listen to me. Your opportunity is now. You've seen the alleged deficiencies in the complaint. They've identified them for you. I've given you my initial reaction to what's in the complaint. If you want to amend, do it now. But it's very unlikely you're going

to get another chance to amend after I've ruled on a fully briefed and fully submitted motion.

MR. FOODMAN: Your Honor, given the procedure you just outlined, I think we would want to take the opportunity to take a look at it and try to amend it because the Court is inclined to think it's a close call, we would like the opportunity to make it clear to the Court why it shouldn't be dismissed. I suppose given that instruction, then we should try to amend at least those two counts that may be problematic.

THE COURT: I think that's a conclusion that's not illogical. So how long would it take you to amend the complaint?

MR. FOODMAN: Your Honor, given the press of other work, I would like at least 20 days, but certainly it's up to your discretion.

THE COURT: Twenty days. Are you okay with that, Mr. Weingart?

MR. WEINGART: Yes, I'm okay with it, subject, of course, to reserving the right to move to dismiss that amended complaint.

THE COURT: Of course. Within 20 days we'll get an amended complaint, if any. Maybe they'll decide not to. And then I don't think we're going to go through another round of premotion letters at that point. Unless you have a brand-new theory that you're going on, Mr. Weingart, as a basis to

dismiss, then you can just go forward with your motion.

So how long after the amended complaint do you think you'd need to file your motion, if in fact you're going to go forward with the motion?

MR. FOODMAN: Your Honor, may I ask a question, please?

THE COURT: Sure.

MR. FOODMAN: Are we limited to these counts?

THE COURT: Are we limited --

MR. FOODMAN: You just mentioned a new idea, and I have thought about an additional count.

THE COURT: You can add new counts if you want to add new counts. If you want to amend, you can amend. Now is the time to amend.

MR. FOODMAN: Thank you, your Honor. I apologize for interrupting.

THE COURT: That's the downside of doing this by phone. The upside is it saves you a lot of time and saves your client a lot of money and you don't have to buy a coat.

MR. FOODMAN: I will be up there if there is a motion to dismiss.

THE COURT: For people who have to travel a distance, it does make sense to at least ask if you can appear telephonically because it may be of interest to do it that way. If I think I really need you up here, I'll tell you, and there

may be times when you want to be here regardless and that's fine too. I don't hold it against somebody for appearing telephonically when they have a great distance to travel.

If you want to amend, amend, and you can add new things. But I do think that if we're going to go forward on the motions to dismiss, the motion to dismiss, I don't think there's much point in doing another whole round of premotion letters. I think if there's a brand-new cause of action -- I don't even think I need that. If there's going to be a motion to dismiss at that point anyway, let's just do it.

MR. WEINGART: Okay. Your Honor, we'd like 45 days to move.

THE COURT: Forty-five days.

MR. WEINGART: Yes.

THE COURT: All right.

MR. FOODMAN: I didn't hear that, your Honor.

THE COURT: Forty-five days to file a motion to dismiss. Forty-five days from the date of the new --

MR. WEINGART: Correct.

THE COURT: -- complaint. Okay. That's more time than I --

MR. WEINGART: Thirty is fine too.

THE COURT: Are you all right with 45, Mr. Foodman?

MR. FOODMAN: Your Honor, I think it's long. We'd like to move the case forward, obviously.

MR. WEINGART: Thirty is fine.

THE COURT: If you've got the press of other business -- I think 20 days to amend might be a lot, but it sounds like Mr. Foodman has some other things. If you've got other things --

MR. WEINGART: I do have other things, which is why I said 45 days.

THE COURT: That's okay. I will say, and maybe I should have said this up front, I'm not inclined to stay discovery given my view as to the breach of contract claim. I do think that one is likely to survive. And so I think discovery should proceed apace. I'm not going to stay it pending resolution of the motion.

MR. FOODMAN: Thank you, your Honor.

MR. WEINGART: We have a shorter schedule on that.

THE COURT: Sometimes people presume that going forward with the motion will automatically stop the discovery schedule and other times they don't presume. Sometimes I will stay it if I think it's a likely winner and will resolve the case. Here it seems to me the breach of contract is going to survive.

I would like the parties in their motion papers to address the venue -- jurisdiction in the first place, and venue more particularly under 1404(a) because I don't have to wait for a motion. So you're sort of on notice that I'm considering

transferring to Florida, or if there's some other venue that would be more appropriate, I'm open to hearing it. But it seems to me New York has virtually nothing to do with this dispute other than that there's a provision in the NDA that references New York and chooses New York law and forum. I'd like you to address that in your papers.

MR. WEINGART: Your Honor, should I wait, in terms of the venue argument, would I be responding to their venue argument or would you like each side to just go ahead and brief that for you?

THE COURT: Just go ahead and do it. Nobody is making the motion, so it's not like you're responding to somebody's motion. This is my motion. This is the Court's sua sponte motion. So I've written on this before, if you want to get a sense as to what I'm looking at. But there's no mystery. It's a 1404 analysis. It turns on the plaintiff's choice of venue, which is entitled to some deference, but usually not much when there's no real connection to the venue, as here. The convenience of the parties, convenience of the witnesses in particular, third party witnesses especially, documents, which really doesn't matter anymore because everything is electronic.

And then issues like what forum will have an easier time of resolving the legal issues. New York law would apply, it seems to me, by contract. I think most Florida courts, a federal court in Florida could handle New York pretty well on

contract and misappropriation of trade secrets. That's basically it.

Whether one party is going to be inconvenienced. It seems like neither party is particularly inconvenienced by being here. In fact, it seems like the defendants, it's easier, though not much easier, to fly to New York from Israel than to Miami. Probably direct flights for both.

MR. WEINGART: It's a wash.

THE COURT: I want you to focus on that. I think that's on my mind.

MR. FOODMAN: Your Honor, may I ask a question?

THE COURT: Sure.

MR. FOODMAN: Do you want us to just issue a memorandum of law on this issue to the Court separately of our amendment or do you want us to incorporate it into our amendment?

THE COURT: Well, if you want to in your amendment include some additional facts, you're certainly free do that. Since there's going to be a motion to dismiss, I think there's going to be briefing, probably, unless you do such a bang up job in your complaint that the defendants say there's no point. If there's in fact going to be a motion to dismiss, then I want to, for efficiency's sake, put everything in one brief. So include a section at the end or at the beginning on jurisdiction and venue. Okay.

MR. FOODMAN: And how would you like us to handle the filing of the complaint? Obviously, we have a difference of opinion on whether there's confidential matter. We would obviously intend on moving again to seal our amended complaint. Do you want us to do that by letter to the Court or how would you like us to handle that?

THE COURT: I think when you submit the complaint, why don't you send it to me with a letter indicating why you believe the presumption of open records has been overcome by the need to protect trade secrets or other proprietary information.

Judge Oetken was the judge who agreed to allow for the redacted version to be docketed. I kind of agree with the defendants on this. It didn't seem to me there was anything proprietary in here that needed to be redacted. So the amended version may have more detail since one of the complaints was that it's not sufficiently detailed. So there might be a lot more in the amended that does justify a sealed or redacted amended complaint.

So I think tee it up. Before you docket it, send a courtesy copy to me with a letter brief that lays out why you believe that the complaint should be filed under seal or portions should be redacted with the redacted version publicly docketed. Okay.

MR. FOODMAN: Okay. Thank you, your Honor. We will

submit that letter along with both the redacted and nonredacted for your review.

THE COURT: Okay.

MR. WEINGART: Your Honor, I'd like to renew my motion to have the plaintiffs file the unredacted copy of the complaint, e-file it, because there is nothing in the redacted complaint that has any proprietary information or trade secrets and, of course, all that happened in an ex parte motion before Viber or our firm had any knowledge of it and it's inappropriate.

THE COURT: Yeah. I think probably the most efficient way to do it -- you have the unredacted complaint, right?

MR. WEINGART: We have it, but it's not filed.

THE COURT: No, I understand that. It's not filed because Judge Oetken signed an order saying it could be docketed the way it was.

Why don't we wait for the amendment. Address in the amendment whether there is a continuing need to seal the original complaint and to seal or redact portions of the amended complaint. So we'll deal with it all at once. I think that's the most efficient way. It will be 20 days. You can then respond to that letter brief that I get that accompanies the amended complaint and then I'll decide.

And generally I will tell you, candidly, I tend to defer on the side of open records. It is a presumption that

has to be overcome, and at least as I look at the complaint here, it doesn't look to me it's been overcome. So I think I'm likely to unseal what Judge Oetken sealed. I have great respect for Judge Oetken. I think he's terrific. But we may agree to disagree on this one and it's my case now.

MR. FOODMAN: Just so that I understand your view on this. If what we allege is sufficient to state a cause of action for a trade secret, how do we allege those trade secret facts and have those facts revealed in a public record?

THE COURT: What I think I've already said is I don't think you've made a case for a trade secret. So as currently filed, it doesn't seem to me the complaint states any real trade secrets. The amended complaint may do a lot more in that regard, which is why you'll get an opportunity to articulate why it is that what's in the new complaint does need to be sealed because there's a trade secret.

MR. FOODMAN: Thank you, your Honor.

THE COURT: If you want to persuade me I'm wrong about the original, you'll get to do that in the letter as well. Address both the need for continued sealing of what's already filed and sealing of the new document as well. Okay?

MR. FOODMAN: Okay. Thank you, your Honor.

THE COURT: Great. All right. Then I guess let's talk about the discovery schedule because I do think discovery should start. It doesn't seem to me whether I only allow the

complaint to go forward on the first cause of action or whether it's all three, it seems to me discovery is going to be pretty much the same. Do you agree with that?

MR. WEINGART: I just want to point out one thing, your Honor. In terms of the decision to allow discovery to go forward, I think it would be a lot more efficient, respectfully, if we waited. And one of the reasons for that is that we have been made aware of an article that appeared in the Israeli press this week that quoted Arik Meimoun, who is the founder of Next, and at length discussed this case and made some very defamatory comments regarding Viber and Rakuten and I can provide the Court with a copy.

THE COURT: What does that have to do with discovery?

MR. WEINGART: Well, because it's going to lead to at least one counterclaim, your Honor. And so we're going to have at least one counterclaim we're asserting once we have to answer a complaint, if we do, and that's going to affect the scope of discovery.

THE COURT: Well, maybe. I guess I'll cross that bridge when I get to it. But I don't want to wait what will effectively be months before we have any discovery. So if we're going to have an amended complaint in 20 days, we're going to have your opening brief in 45 days. We haven't finished this schedule.

How long are you going to need to respond,

Mr. Foodman?

MR. FOODMAN: To their document.

THE COURT: Thirty days tops, unless you're in the middle of a trial or something.

MR. FOODMAN: I think that's fine. Thirty days is fine, your Honor.

THE COURT: Then ten days for a reply brief.

So I have another matter I'm supposed to start. So I'll issue an order that sets out these dates with calendar dates as opposed to numbered dates, but that will be the rough schedule, okay.

MR. WEINGART: Would you like oral argument, your Honor?

THE COURT: Not unless I think it's necessary. So the reason I have premotion conferences is to sort of kick the tires and get my head in the game. Sometimes I find I don't need oral argument once I've done that. The briefs then, I think, speak for themselves. If I think I need oral argument, I'll let you know.

In the meantime, we'll go forward with discovery. The schedule you proposed is one I can live with. If it turns out that there's a counterclaim that requires tweaking of it, I'm open to that. We'll see when we get there. But for now, fact discovery will wrap up by September 30, as you proposed.

Expert discovery, which I guess will be more in the

nature of the technical trade secret issues and perhaps also damages, that's what I'm assuming for experts. Is that right, Mr. Foodman?

MR. FOODMAN: Yes, your Honor.

THE COURT: You've got expert discovery that goes pretty late. I think there's a little bit of confusion on what you have for the expert discovery. You've got paragraph 8, I talk about all expert disclosures, including reports, production of underlying documents, and depositions shall be completed by the deadlines that you set forth. So that's October 30 for plaintiffs, December 4 for defendants. But then you folks had given yourselves another six or eight weeks to complete discovery in total.

What do you anticipate happening between December 4 and January 31?

MR. WEINGART: Well, your Honor, we discussed this. The parties discussed this the schedule at length, and this is sort of what we came up with in terms of a reasonable.

THE COURT: Usually I can see a week after expert discovery is wrapped up to allow you to just sort of dot Is and cross Ts. But seven or eight weeks strikes me as excessive.

MR. WEINGART: We were talking about the holidays at the end of December, everybody goes away. So we thought we could just have discovery at the end of January. That way, we could, again, as you say, dot the Is and cross the Ts.

THE COURT: That usually should take a week. That's just making sure that the errata sheet in the deposition has been done. So I'm going to say --

MR. WEINGART: January 15 or something like that.

THE COURT: December 31. I'd normally give you a week. So it would be December 11. I'll give you until the end of December. No reason why you have to use all that time. But I think that should be sufficient.

And then I'm going to pick a day for a post discovery conference that will be middle of January. Because I'm in the robing room, because we're doing this on the speakerphone, I don't have my calendar right in front of me. Does anybody know what their schedule is like in January that there's certain days that don't work? I'm presuming probably the Friday in the middle of January. I'd probably do it on a Friday.

MR. FOODMAN: Your Honor, I don't have anything scheduled.

THE COURT: I'll pick a date. If it turns out it's a date you can't manage, you'll send me a letter asking to adjourn it.

What I want, if there are going to be summary judgment motions at that point with discovery over, same drill, premotion letters. You know how it goes. So I'd like those on the same day discovery closes, so December 31.

You've asked for a referral to Judge Netburn for

settlement discussions. That's fine. I'll make a referral to her today for that. When do you think would be the optimal time to have a sitdown with Judge Netburn? Sometimes folks think let's do it right away, get in there before we start spending a lot of money. Other times say we've got motions that could reduce or even resolve the case. We've got some discovery that's going to be absolutely essential to have meaningful settlement discussions.

MR. FOODMAN: Your Honor, for the plaintiff, we certainly need some discovery to understand what was communicated by Viber in order to have meaningful discussions. So we will need some discovery to take place.

THE COURT: So what's a date that is a safe date by which you will contact Judge Netburn?

MR. FOODMAN: From my perspective, sometime in the summer would be appropriate. Obviously, I would like to coordinate it with opposing counsel. But if the Court wants a date now, I can look at my calendar.

THE COURT: Just a ballpark date. You're saying summer, July 1?

MR. WEINGART: I think that's early, your Honor.

MR. FOODMAN: That's fine from my perspective.

MR. WEINGART: Frankly, I don't think Viber is going to have much of an interest in that process. I think we should let discovery play out. Before we make dispositive motions,

maybe that's the time to do it.

THE COURT: So you're saying after discovery has wrapped up.

MR. WEINGART: Correct.

THE COURT: So I'm going to say after fact discovery. So by September 30, you should contact Judge Netburn. You can then discuss with Judge Netburn when is an appropriate or convenient time for you and she to get together. But that's the date by which you should contact her.

If between now and then you decide, hey, things have changed, let's get in there and see Judge Netburn, you can do that. I'm going to make the referral today, but with the notation that the parties will contact her no later than September 30 and she'll be just waiting for you. So don't go past the deadline. Don't make her hunt you down. But if you want to talk to her sooner, that's your prerogative.

MR. WEINGART: Your Honor, if I could just to go back to one point. The time frame between finishing up experts and making dispositive motions is extremely short in that schedule and I was wondering whether you could push it into January at least.

THE COURT: Wait. The date --

MR. WEINGART: I think you said dispositive motions would have to be by December 31.

THE COURT: No. I said a premotion letter would need

to be submitted by December 31.

MR. WEINGART: Premotion letter. Okay. Thank you.

THE COURT: And then we'll use the conference that I'll schedule for mid-January to talk about any motions that are contemplated.

MR. WEINGART: That's fine.

THE COURT: If there are none, we'll set a trial date. But if there are motions, I'll set a briefing schedule and we'll do what we did here today. We'll kick the tires and talk about the relative merits. Sometimes I'll say this is clearly a disputed issue of fact. But, again, I never tell the party they can't make a motion. You have a right to make a motion. Okay.

The only thing I refer to a magistrate judge is settlement. Everything else I keep myself. So if there are discovery disputes, those should come to me with the following proviso. I expect that the parties will confer and work professionally and courteously to try to resolve whatever disputes they have and so do that.

If after a reasonable period of time it turns out that you just have a good faith disagreement about discovery, tee it up for me in a joint letter, which shouldn't be more than five pages, laying out your respective positions. I will then resolve it probably just on the basis of that letter. If I need more information, maybe I'll get you on the phone. But

that's usually the way it goes.

I will tell you candidly in 98 percent of my cases, I have no disputes at all. The parties manage it beautifully without my involvement. Once in a while, they have good faith disputes. They just have a different view as to what's appropriate and they tee it up for me and I resolve it.

1 percent of the cases I have the equivalent of a root canal because the parties hate each other and think if they're not inflicting pain, they're not doing right. And you don't want to be those lawyers because those are the lawyers that make me question my career choices. And so it's just not worth it. So don't be those lawyers.

If somebody is in the middle of a trial, you cannot expect they're going to call you in ten minutes when you've left then a voice mail or sent an email. On the other hand, even being on trial doesn't mean you're AWOL for two weeks. We don't live in that kind of world. Be courteous, be professional. You obviously have to zealously represent your clients, but it doesn't have to be an adversarial system in the sense of being unpleasant.

I have no reason to think that you need that speech. I just find when I don't give that speech is when we get into trouble. So to take it in the spirit that it's conveyed.

All right. So I will issue an order today that lays out these various dates. And I'll docket the case management

plan with the handful of insertions that I just made.

Is there anything else we should discuss before I jump on a criminal matter that they're waiting on?

MR. WEINGART: No, your Honor.

MR. FOODMAN: Nothing from the plaintiff, your Honor.

THE COURT: Okay. Let me thank the court reporter. If anyone needs a copy of the transcript, you can take it up with the court reporter I guess through the website because I'm going to need to commandeer here for this other matter I've got. Thanks.

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